United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 8, 2004

TO : James J. McDermott, Regional Director
Region 31

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: United Food & Commercial Workers Union,
Locals 135 and 324

	536-0150-7500
Cases 31-CB-11417-2, 31-CB-11427-2,	536-1200
and 31-CB-11448-2	536-5075-0150-5000
	536-5075-5017-7500

These Section 8(b)(1)(A) cases were submitted for advice as to whether two union locals unlawfully refused to pay three former members strike benefits they had earned prior to resigning their union memberships and returning to work for the struck employer. We conclude that the locals' actions unlawfully interfered with the affected employees' Section 7 right to refrain from concerted activity. Therefore, the Region should issue a Section 8(b)(1)(A) complaint, absent settlement.

FACTS

Locals 135 and 324 (the Locals) are among seven UFCW locals (the Union) that represent employees of Albertson's, Ralph's, and Vons grocery stores (the Employers) in Central and Southern California. On October 5, 2003,[1] the parties' collective-bargaining agreement expired and the employees overwhelmingly rejected the Employers' contract proposal. On October 11, the Union struck Vons and established picket lines outside its stores.

Employees who honored the strike received strike benefits based upon the number of hours they spent manning the picket lines. There is no indication that the Union or the Locals conditioned the receipt of strike benefits on any other criteria, such as an employee's financial need.[2]

---

[1] All dates are 2003.

[2] Local 135 has asserted, without producing any evidence, that it made an agreement with its members tying eligibility for strike benefits to their continued support of the strike.

Each charging party was a member of either Local 135 or Local 324 who initially honored the strike and received strike benefits for performing picket line duties. On various dates in October and December, each validly resigned his Union membership, requested financial core status, and returned to work for Vons. None had yet been paid for the time he spent on the picket line in the week prior to resigning from the Union, and the Locals have since refused to pay these employees their "accrued" strike benefits.

ACTION

We conclude that the Locals' refusal to pay the three employees the accrued strike benefits at issue unlawfully interfered with their Section 7 right not to engage in concerted activity.

It is well settled that Section 7 protects an employee's right to refrain from strikes and to resign from a union.[3] Thus, in Canterbury Coal,[4] the Board held that the union unlawfully restrained and coerced employees in the exercise of these fundamental Section 7 rights by maintaining and enforcing a rule requiring that any striker who returned to work for the struck employer reimburse the union for strike benefits previously received, regardless of whether the individual had resigned from the union prior to returning to work. The Board concluded that the rule exacted a financial penalty from employees who had exercised their right to return to work after resigning from the union, and noted that enforcing the rule impermissibly allowed the union to treat employees who had resigned from the union as members for the purpose of imposing such penalties.[5] The Board rejected the union's argument that enforcing its reimbursement rule constituted an internal union matter outside the Board's jurisdiction, because

---

[3] Machinists Local 1414 (Neufeld Porsche-Audi), 270 NLRB 1330, 1331 (1984) (holding that any restriction on a member's right to resign union membership is invalid, and that the union violated Section 8(b)(1)(A) by imposing a post-resignation fine against a former member pursuant to a provision in the union's constitution), affd. in principle by Pattern Makers' League of North America v. NLRB, 473 U.S. 95, 104-105 (1985) (union restrictions on the right to resign are inconsistent with the Act's policy of voluntary unionism).

[4] 305 NLRB 516 (1991).

[5] Id. at 519, citing Sheet Metal Workers Local 9 (Concord Metal), 297 NLRB 86 (1989), and Sheet Metal Workers Local 29 (Metal-Fab, Inc.), 222 NLRB 1156 (1976).

unlike Allis-Chalmers,[6] the affected employees had resigned from the union.[7]

However, a union may lawfully withhold strike benefits from employees if it does so based upon neutral considerations. For example, in Pottery Workers (Colton Mfg. Co.),[8] the Board dismissed a Section 8(b)(1)(A) complaint attacking the union's denial of strike benefits to three strikebreakers after they had validly resigned from the union, because the evidence established that the union administered its strike benefits program based upon financial need, and not strike service.[9] The record showed without contradiction that "even the most loyal and active participants" did not qualify for benefits if they received any substantial earnings, regardless of the source of such income.[10] Thus, the Board upheld the ALJ's finding that the union had not denied strike benefits as punishment or discipline for the employees' strikebreaking activities, but rather, did so "pursuant to its undisputed policy of husbanding its strike treasury by limiting payments to those who had 'need' for the benefit."[11]

Applying this precedent here, we conclude that the Locals' refusal to pay the employees their accrued strike benefits unlawfully restrained and coerced them in the exercise of their Section 7 right to resign from the Union and return to work for Vons. Thus, unlike Colton Mfg., there is no evidence that the Locals denied strike benefits to these employees pursuant to a non-discriminatory policy. Rather, despite satisfying the sole criterion for receiving strike benefits -- manning the picket line for a threshold number of hours -- the Locals exacted a financial penalty from the employees in retaliation for their having elected to refrain from concerted activity. In these circumstances,

---

[6] NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967) (holding that a union may lawfully fine members who return to work during a strike, because Congress had not intended that a union's internal affairs be regulated in such circumstances).

[7] 305 NLRB at 520.

[8] 254 NLRB 696 (1981).

[9] Id. at 699.

[10] Ibid.

[11] Ibid.

withholding the accrued strike benefits from the employees was fundamentally equivalent to an unlawful post-resignation fine against them.[12]

Finally, although Local 135 claims its members had agreed that receiving strike benefits was dependent on their continued support for the strike, Local 135 has not produced evidence to substantiate any such agreement. Moreover, any such agreement would itself unlawfully restrict an employee's Section 7 right to resign from the Union.[13]

Accordingly, absent settlement, the Region should issue a Section 8(b)(1)(A) complaint.

B.J.K.

---

[12] See Colton Mfg., 254 NLRB at 699 ("withholding of an 'accrued' benefit in order to penalize a post-resignation strikebreaker has just as much coercive impact on that employee as would a union's clearly unlawful attempt to extract the same amount from the same employee in the form of a disciplinary fine").

[13] Pattern Makers', 473 U.S. at 104-105. See also Canterbury Coal, 305 NLRB at 520 (internal citations omitted) (rejecting the union's argument that employees were not coerced or restrained where they had voluntarily agreed to repay benefits upon their return to work), and NLRB v. Textile Workers Local 1029, Granite State Joint Board, 409 U.S. 213, 217-218 (1972) (concluding that "the vitality of [Section] 7 requires that the member be free to refrain in November from the actions he endorsed in May").